

No. 75-1880

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

THE TITLE GUARANTEE COMPANY, a Subsidiary of
PIONEER NATIONAL TITLE INSURANCE COMPANY, a Sub-
sidiary of TITLE INSURANCE AND TRUST COMPANY, a
Subsidiary of THE TI CORPORATION (OF CALIFORNIA),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

**MEMORANDUM OF THE CHAMBER OF COM-
MERCE OF THE UNITED STATES OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT**

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INTEREST OF AMICUS CURIAE ¹

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of commerce and professional and trade

¹ Consents to the filing of this Memorandum from the Solicitor General of the United States and Title Guarantee have been filed with the Clerk of the Court.

associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. The Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before the Court. *E.g.*, *Connell Constr. Co. v. Local 100, Plumbers*, 421 U.S. 616 (1975); *Boys Market v. Retail Clerks*, 398 U.S. 235 (1970); *Porter Co. v. NLRB*, 397 U.S. 99 (1970). The Chamber has also participated *amicus curiae* in *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975); *Renegotiation Bd. v. Bannerkraft*, 415 U.S. 1 (1974); *Kent Corp. v. NLRB*, — F2d —, (5th Cir. 1976) (No. 74-1710) 92 LRRM 2152; and *Automobile Club of Missouri v. NLRB*, — F. Supp. — (D.D.C. 1973) (No. 924-73) all of which involved questions pertaining to the Freedom of Information Act.

The specific issues presented here are:

1. Whether certain materials in possession of the General Counsel of the Labor Board relating to unfair labor practice charges against a charged party are subject to disclosure, prior to an administrative hearing on these charges, pursuant to the terms of the Freedom of Information Act (FOIA). Specifically, the material requested in this case includes "copies of all written statements, signed or unsigned, contained

in the Board's case file . . . " and procured during the investigation of the unfair labor practice charges.

2. Whether the FOIA confers upon federal courts the authority to enjoin scheduled administrative hearings until the charged party has a reasonable opportunity to review the requested material.

These issues are of particular concern to the Chamber's members who like most employers are subject to the Labor Board's jurisdiction. Moreover, the decision of the Court of Appeals, permitting the General Counsel to withhold the material requested, is antithetical to the letter as well as to the legislative policy underpinning the FOIA, and injures not only employers, but labor organizations who appear as defendants before the General Counsel in evidentiary hearings. The erroneous rationale underpinning the opinion below, while pertaining specifically to the Labor Board, may well be applied to other governmental agencies to the grave detriment of private parties appearing before them. Because the ultimate resolution of the issues presented here is of vital concern to its members, the Chamber believes it is appropriate to present its views in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT

I. The Uncontested Facts

In late May 1975, the Union² filed refusal to bargain charges under the National Labor Relations Act (29 U.S.C. § 141 *et seq.*) against Title Guarantee. The Board's New York Regional Office conducted an *ex*

² District 65, Wholesale, Retail Office and Processing Union, Distributive Workers of America.

parte investigation of the Union's allegations. Board personnel obtained written statements from Union representatives and officials and from employees of Title Guarantee. As a result of this investigation, the Board's Regional Director issued a complaint on June 30, 1975, charging Title Guarantee with the unfair labor practices alleged by the Union. October 14, 1975, was set as a hearing date.

In July 1975, Title Guarantee requested the Board's New York Office to furnish it with all signed and unsigned written statements obtained during the investigation of the Union's charges against Title Guarantee, as well as any subsequent statements which might thereafter be obtained. The Board's Regional Director refused to furnish Title Guarantee with the requested documents, and on appeal his decision was upheld by the Board's General Counsel in Washington, D. C. Thereafter, Title Guarantee filed the instant cause in the United States District Court for the Southern District of New York to compel disclosure of the requested statements under the Freedom of Information Act (5 U.S.C. § 552).

II. The Decisions Below

After *in camera* review, the District Court relied upon the Court's opinion in *E.P.A. v. Mink*, 410 U.S. 73 (1973) to conclude that the factual statements requested by Title Guarantee were not "memorandums or letters" protected from disclosure by exemption (b)(5) of the FOIA.³ 407 F.Supp. at 501-03. The Dis-

³ 5 U.S.C. § 552(b)(5) provides:

This section does not apply to matters that are—inter-agency or intra-agency memorandums of letters which would not be available by law to a party other than an agency in litigation with the agency;

trict Court also rejected the Board's contention that the requested statements were privileged against disclosure before trial by exemptions (b)(7)(A), (C), and (D) of the FOIA.⁴ In light of the 1974 amendments to exemption (b)(7) which were intended to narrow its scope, the District Court concluded that "general contentions" alleging interference with enforcement proceedings and effective trial preparation and reluctance of individuals to volunteer information, were insufficient to meet the Board's burden of proof imposed under 5 U.S.C. § 552 (a)(4)(B).⁵ 407 F. Supp. at 503-04. The District Court further concluded that the Board had failed to demonstrate how disclosure of the requested materials would adversely affect attorney trial preparation, public access to Board processes, the public's right to privacy, or promises of confidentiality to persons volunteering information to the Board. 407 F.Supp. at 504-05. Accordingly, the District Court directed the Board "to turn over the material sought by [Title Guarantee] for inspection and copying"

⁴ 5 U.S.C. § 552(b)(7) exempts from disclosure:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . .

⁵ This provision provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

before the October 14 hearing date. 407 F.Supp. at 505.

The Court of Appeals (Circuit Judges Moore, Oakes and Meskill) reversed the judgment of the District Court. 91 LRRM 2993. The Second Circuit considered only FOIA exemption (b)(7)(A). It held that under the 1974 amendments to the FOIA, this exemption precludes disclosure of any documents pertaining to a pending enforcement proceeding. 91 LRRM at 2997-98. The Court of Appeals further held that disclosure would "necessarily" enable charged parties to escape responsibility for unfair labor practices and chill employee and union official cooperation with the Board "for fear of incurring employer displeasure". 91 LRRM at 2998. In *dicta*, the Court of Appeals commented that the District Court's refusal to accept the Board's reliance upon FOIA exemptions (b)(5) and (b)(7) (C) and (D) was supported by both reason and precedent. 91 LRRM at 2997 ns. 10 and 11, and 2999 n. 15.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals rests on an erroneous interpretation of the Congressional purpose expressed in the 1974 FOIA amendments; it nullifies the burden of proof to justify nondisclosure imposed upon all federal agencies by Congress in § 552(a)(4) (B) of the FOIA; and it raises important issues which vitally affect all private parties faced with law suits instituted by federal agencies. Review by the Court is thus fully warranted.

1. Congress intended to narrow the scope of the (b)(7) exemption against disclosures. Senator Hart sponsored this amendment (120 Cong. Rec. S.9337

(1974)), and the statutory language was designed to eliminate the prevailing practice approved by certain courts under which federal agencies frustrated disclosure by simply stating that the requested documents were part of an "investigatory file." Legislative History, Texts, and Other Documents (March 1975) 332 (Remarks of Senator Hart).⁶ In response to a question from Senator Kennedy, Senator Hart stated (120 Cong. Rec. S. 9334 (1974)) that the amended language was specifically fashioned to overrule cases like *Weisberg v. Dept. of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) and *Center for National Policy v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) which had engrafted such broad protection upon exemption (b)(7). Although the Court of Appeals disclaimed making "the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable," its ruling, in effect erroneously re-established as a matter of law that all materials related to an ongoing unfair labor practice enforcement proceeding are exempt from disclosure until the case is closed. Senator Hart's amendment did not deal only with closed files but active cases, and his amendment was fashioned to preclude any broad blanket of secrecy by requiring "the agency to show why the disclosure of the particular document should not be made." Source Book 332 (Remarks of Senator Hart). See also Source Book 293 (Remarks of Senator Kennedy). In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Court declined to consider the narrowed scope of the (b)(7) exemption. 421 U.S. at 162-65. The instant petition presents a timely and appropriate occasion to do so.

⁶ Hereinafter cited as "Source Book".

2. Section 552(a)(4)(B) of the FOIA imposed upon the agency raising an exemption to disclosure the burden to justify its action. The Court of Appeals erroneously ruled (91 LRRM at 2998), contrary to the District Court, that this "burden" was met by unsupported oral allegations that employees "may be reluctant" to volunteer information to the Board for fear of employer retaliation, and charged parties "might be able" to construct defenses to avoid liability for alleged unfair labor practices. However, under the amendment to (b)(7) the burden is not met by such vague assertions; rather the agency must demonstrate that its prospective case would actually be harmed by pre-trial release of the requested statements. Source Book 333 (remarks of Senator Hart). As the Fifth Circuit has observed, such a showing should be made by affidavit evidence, oral testimony, as well as *in camera* inspection. *Kent Corp. v. NLRB*, — F.2d — (5th Cir. 1976) (No. 74-1710), 92 LRRM 2152, 2160 n. 30. The Second Circuit's failure to require positive factual demonstration of "interference" under exemption (b)(7) is contrary to the 1974 legislative amendments to this exemption, and nullifies the express Congressional statutory direction that agencies have the burden of justifying nondisclosure.⁷ This interpretation runs directly counter to the manifest purpose of § 552(a)(4)(B) and, unless corrected, will frustrate the Congressional policy of ending government secrecy.

⁷ Indeed, the First Circuit has recently interpreted the instant ruling as shifting this burden to the party seeking disclosure. *Goodfriend Western Corp. v. Fuchs*, — F.2d — (1st Cir. 1976) (No. 76-1116), 92 LRRM 2466, 2467. Such a holding is flatly inconsistent with the statutory language in § 552(a)(4)(B) of the FOIA.

The exemptions to the FOIA were not intended by Congress to be triggered by real or imagined Labor Board fears of employer retaliation against government witnesses. Rather, in the National Labor Relations Act itself "Congress . . . made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967). Thus, the protection against any retaliations set forth in § 8(a)(4) of the Act⁸ has been broadly interpreted by a unanimous Court to include persons who give "a written sworn statement to a Board field examiner investigating an unfair labor practice charge." *NLRB v. Scrivener*, 405 U.S. 117, 125 (1972). See also *NLRB v. Local 22, Marine Wkrs.*, 391 U.S. 418 (1968) (§ 8(b)(1)(A) protects union members from expulsion from union for filing charges with NLRB). This statutory protection applies to all persons who cooperate with Board conducted investigations regardless of whether they are actually called as witnesses, or the case settles before trial as a large percentage of such cases do.

The Board's steadily increasing caseload suggests that employees are aware of or informed of this express

⁸ This provision of the National Labor Relations Act provides:

It shall be an unfair labor practice for an employer—

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act . . .

While this provision reads "testimony" rather than evidence or statements, nothing in the legislative history surrounding its enactment suggests the Congress intended to protect only persons who actually testify in Board conducted hearings.

statutory protection and pre-trial cooperation seems readily securable.⁹ And if Board personnel are candid with persons cooperating with pre-complaint investigating, these persons are advised before trial that there is reasonable expectancy they will be called to testify at a public hearing in the presence of their employer. Thus assuming *arguendo* any fear of reprisal, it makes little difference to the employee whether his name is revealed to his employer before or at the time of trial. Risk of reprisal is logically no greater whether identity is disclosed before trial or during it. It follows that disclosure of the statements requested by Title Guarantee cannot fairly be assumed to frustrate employee cooperation with Board agents during investigation of unfair labor practice charges.

The Court of Appeals also improperly assumed charged parties might use pre-trial disclosures to escape liability for unfair labor practices. A more reasonable assumption would be that such information would enable an employer or labor organization to "deal effectively and knowledgeably with the Federal agencies" (S.Rep. No. 813, 89th Cong., 1st Sess., 7 (1965)), and thereby to settle or litigate on the basis of the actual strengths and weaknesses of the government's case. It is precisely this right that the FOIA intended to secure. See, *e.g.*, *NLRB v. Schill Steel Prods. Inc.*, 408 F.2d 803, 805 (5th Cir. 1969).

⁹ Section 11 of the Act, 29 U.S.C. § 161 authorizes the Board to compel persons, including employees, to give statements to Board agents during the investigation of unfair labor practice charges. Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969). Such persons are also protected by § 8(a)(4). *Pederson v. NLRB*, 234 F.2d 417, 420 (2d Cir. 1956).

3. The Court should also review the scope of the other exemptions raised and fully litigated by the Board before the District Court. Otherwise private parties seeking pre-trial documents must await piecemeal litigation before a comprehensive resolution of the scope of exemptions (b)(7)(C) and (D) and (b)(5) will be forthcoming. The scope of these exemptions have divided federal district courts¹⁰ and thus resolution by the Court is now timely. For the reasons stated by the District Court in the instant case, the Chamber submits that these exemptions do not preclude disclosure of statements before trial to a charged party sued by the Board's General Counsel.

4. District Courts have also reached directly contrary rulings whether scheduled Board conducted hearings may be enjoined pending resolution of disclosure issues raised under the FOIA. Compare, *e.g.*, *AU & Son, Inc. v. NLRB*, — F.Supp. — (W.D.Pa. 1976) (No. 76-027) 91 LRRM 2430, 2431; *with Capital Cities v. NLRB*, — F.Supp. — (N.D.Cal. 1976) (No. C-75-2352) 91 LRRM 2565, 2566. The District Court entered such an injunction (407 F.Supp. at 505-06, 506-08), and the Court of Appeals did not question the propriety of granting injunctive relief under the FOIA.

¹⁰ Compare, *e.g.*, *Barnes & Noble Bookstores v. NLRB*, — F.Supp. — (S.D.N.Y. 1976) (No. 76C-1168) 92 LRRM 2169; *McDonnell Douglas Corp. v. NLRB*, — F.Supp. — (D.C.Cal. 1976) (No. CV 76-0409) 92 LRRM 2072; *Bellingham Frozen Foods v. Henderson*, — F.Supp. — (W.D.Wash. 1976) (No. C76-119m) 91 LRRM 2761; *Atlas Indus. v. NLRB*, — F.Supp. — (N.D.Ohio 1976) (No. C-76-27) 91 LRRM 2676; *Local 32, Plumbers v. Irving*, — F.Supp. — (W.D.Wash. 1976) (No. C76-39M and C76-100S) 91 LRRM 2513; *NLRB v. Hardeman Garmet Corp.*, — F.Supp. — (W.D.Tenn. 1975) (No. C-75-148) 91 LRRM 2232 *with Harvey's Wagon Wheel v. NLRB*, — F.Supp. — (N.D.Cal. 1976) (No. C-75-2407) 91 LRRM 2410.

The Senate, at least, was under the impression the Court had held in *Renegotiation Bd. v. Bannercraft Co.*, 415 U.S. 1 (1974), "that the FOIA confers jurisdiction on the courts to enjoin administrative proceedings pending a judicial determination of the applicability of the Act to documents involved in those proceedings." Source Book 165 (S. Report No. 93-854, 93d Cong. 2d Sess. (1974)). Any other rule would deprive the party seeking disclosure of an opportunity to prepare defenses or propose settlement prior to commencement of the hearing. The Court should now avail itself of this opportunity to remove any existing ambiguities over the scope of the *Bannercraft* decision.

CONCLUSION

For the foregoing reasons, as well as those advanced by Petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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